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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/005,757	11/02/2001	Joseph D. Franko SR.	QAL-30	9068

32863 7590 07/29/2003

WALTER K. ROLOFF
490 HARBOR COURT
SHOREVIEW, MN 55126

EXAMINER

CARTER, MONICA SMITH

ART UNIT PAPER NUMBER

3722

8

DATE MAILED: 07/29/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/005,757

Applicant(s)

FRANKO, JOSEPH D. CN

Examiner

Monica S. Carter

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 04 June 2003.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-4 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-4 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) The proposed drawing correction filed on _____ is: a) approved b) disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____ .
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) The translation of the foreign language provisional application has been received.
- 15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
- 4) Interview Summary (PTO-413) Paper No(s). _____ .
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other:

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kaufmann ('224) in view of O'Reilly et al. ('966).

Kaufmann discloses an extended text label for a container (1).

Kaufmann disclose the claimed invention except for claimed structure of the container.

O'Reilly et al. disclose a single use dispensing sachet (10) comprising a product dispensing end (30) and a filling end opposite the product dispensing end (see figures 8-10), the filling end adapted to be sealed (as seen in figure 15). Therefore, it would have been obvious to one having ordinary skill in the art at the time of the invention to modify Kaufmann's invention by replacing the container with a container having a sealed filling end and dispensing end, as taught by O'Reilly et al., to provide a different type of container for dispensing products such as "shampoo, medication, soap, food pastes, sauces, creams and so on." (see col. 1, lines 14-16).

Note: Sealing the filling end by a crimp method subsequent to filling the container with a selected product and the label being capable of being securely joined to the filling end of the container by way of the crimp method do not structurally limit the claim. The

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patentability of a product does not depend on its method of production. Product-by-Process claims are not limited to the manipulations of recited steps, only the structure implied by the steps. (See MPEP 2113) Furthermore, it is inherently known that the filling end would be sealed after filling the container as it would be quite difficult to fill the container after it has been sealed.

Kaufmann, as modified by O'Reilly, discloses the claimed invention except for securely joining the label to the filling end of the container. Kaufmann discloses sealing the label to a side surface located inside of the edges of the container. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to position and seal the label at any desired location on the container, since it has been held that rearranging parts of an invention involves only routine skill in the art. *In re Japikse*, 86 USPQ 70.

Regarding claim 2, Kaufmann, as modified by O'Reilly et al., discloses a pliable attachment tongue (5) extending outwardly from the label (see figure 6, edge 5 extends outwardly to the left of the label – wherein the label is a combination of 2, 3). Note: The tongue being capable of being securely joined to the filling end of the tube container by way of the crimp method does not structurally limit the claim. The patentability of a product does not depend on its method of production. Product-by-Process claims are not limited to the manipulations of recited steps, only the structure implied by the steps. (See MPEP 2113)

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3. Claims 3 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kaufmann in view of O'Reilly et al. and further in view of Weiss et al. ('711).

Kaufmann, as modified by O'Reilly, discloses the claimed invention except for a tear off portion provided along the crimp edge.

Weiss et al. discloses a container (12) having a label (16) secured thereto. The label comprises a score (22) separating the label into first (24) and second (26) segments. The score facilitates separation of the first and second segments. Therefore, it would have been obvious to one having ordinary skill in the art at the time of the invention to modify Kaufmann's invention to include a tear off portion, as taught by Weiss et al., to enable the label to be released from container without damaging the label.

Response to Arguments

4. Applicant's arguments filed June 4, 2003 have been fully considered but they are not persuasive.

Applicant argues that Kaufmann fails to provide any teaching or suggestion of any capability of attachment of element 5 via a crimp method whatsoever. As stated above, the patentability of a product does not depend on its method of production. Product-by-Process claims are not limited to the manipulations of recited steps, only the structure implied by the steps. (See MPEP 2113) Therefore, the examiner maintains that the claimed structure of the combination of the label and container is disclosed by Kaufmann as modified by O'Reilly.

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Applicant argues that O'Reilly et al. fail to disclose the claimed tube container since O'Reilly's sachet's is well known in the art to be of the "single use" variety of containers and which has, furthermore, never been considered to be a tube. The American Heritage ® Dictionary of the English Language, Third Edition defines a tube to be "A small, flexible cylindrical container sealed at one end and having a screw cap at the other, for pigments, toothpaste, or other pastelike substances." (see attached definition). The definition does not set forth that the tube container must be able to be repeatedly used. Therefore, the examiner maintains that O'Reilly et al. define the claimed tube container. Furthermore, Kaufmann alone discloses the use of a container (1) which could, inherently, include any type of container (i.e., tube container, sachet, etc.) depending on the intended use of the end product.

Applicant argues that Kaufmann fails to disclose the claimed pliable attachment tongue as set forth in claim 2. The examiner disagrees. As seen in figure 6, the edge 5 provides the claimed pliable attachment tongue that extends to the left of the label structure (2, 3).

Applicant argues that there is a lack of motivation in the art to combine the references in the manner used in the previous Office action (Paper No. 5). In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art.

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See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Kaufmann discloses the combination of a container and a label. Kaufmann, however, does not disclose the claimed structure of the container. O'Reilly et al. disclose the claimed tube container having a filling end and a product dispensing end (as seen in figures 8-10). Kaufmann, as modified by O'Reilly et al., however, does not disclose a tear off portion for permanently removing the label from the container. Weiss is used solely for disclosing such a tear off portion. Therefore, the examiner asserts that the combined references provide the required motivation and/or suggestion.

For the reasons as set forth above, the rejections are maintained.

Conclusion

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of


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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Monica S. Carter whose telephone number is (703) 305-0305. The examiner can normally be reached on Monday-Thursday (8:00 AM - 5:30 PM).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Andrea L. Wellington can be reached on (703) 308-2159. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.


Monica S. Carter
Primary Examiner
Art Unit 3722

July 28, 2003

tube

tube (tūb, tyūb) *noun*

1. **a.** A hollow cylinder, especially one that conveys a fluid or functions as a passage. **b.** An organic structure having the shape or function of a tube; a duct: a *bronchial tube*.
2. A small, flexible cylindrical container sealed at one end and having a screw cap at the other, for pigments, toothpaste, or other pastelike substances.
3. *Music.* The cylindrical part of a wind instrument.
4. *Electronics.* **a.** An electron tube. **b.** A vacuum tube.
5. *Botany.* The lower, cylindrical part of a gamopetalous corolla or a gamosepalous calyx.
6. *Chiefly British.* A subway; an underground.
7. A tunnel.
8. An inner tube.
9. *Slang.* **a.** Television: *What's on the tube?* **b.** A television set.

verb

tubed, tub-ing, tubes *verb, transitive*

1. To provide with a tube; insert a tube in.
2. To place in or enclose in a tube.

verb, intransitive

Informal.

To float down a stream or river for recreation in an inner tube: *went tubing on Sunday afternoon.*

— *idiom.*

down the tubes or **down the tube** *Slang.*

Into a state of failure or ruin: *saw all her plans go down the tubes.*

[French, from Old French, from Latin *tubus*.]

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